UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

RITE AID OF WEST VIRGINIA, INC.

Employer/Petitioner

and Case 9-RM-1052

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, UFCW [1] /

Union

**DECISION AND ORDER**

The Employer/Petitioner (The Employer) is engaged in the retail sale of pharmaceuticals and general merchandise at various retail locations throughout the United States, including a store located at 3114 Teays Valley Road, Hurricane, West Virginia, the only facility involved in this proceeding. The Employer has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act to determine whether employees at its Hurricane, West Virginia, store wish to be represented by the Union. [2] / The Union contends that the Employer has waived its right to an election under the terms of the extant collective-bargaining agreement. The Employer disagrees with the Union's position asserting that the language relied on by the Union to establish a waiver is ambiguous, that a waiver is against public policy, and that the Union has failed to demonstrate majority support, as required by the parties' collective-bargaining agreement.

A hearing officer of the Board held a hearing on the issues raised by the petition and the parties filed briefs with me. [3] / I have carefully considered the evidence and the arguments presented by the parties at the hearing and in their briefs and have concluded, as discussed in detail below, that the Employer has waived its right to an election. Accordingly, I will dismiss the petition.

## I. THE COLLECTIVE-BARGAINING RELATIONSHIP BETWEEN THE PARTIES AND THE EVOLUTION OF THE UNION RECOGNITION CLAUSE

Voluntary Recognition

The record reflects that the Employer and Union entered into their initial collective-bargaining agreement sometime in 1973. Subsequent to the initial agreement, the Employer began opening additional stores within the geographical jurisdiction of the Union. When the new stores opened, the Union's representative went to the store and "signed everybody up," notified the Employer, and the Employer recognized the Union as the collective bargaining representatives for those employees and included them under the terms of the existing collective- bargaining agreement. The record reflects that the recognition granted was "automatic."

On March 10, 1993, the Employer sent a letter to the Union confirming that the past practice had been to recognize the Union as the representative of employees in newly opened stores in those counties where Cohen, the predecessor employer, formerly operated stores. In the letter, the Employer stated that, in its opinion, such a procedure violated employees Section 7 rights and would no longer be followed. The Employer added that in the future recognition would only be granted upon demonstration by the Union that it in fact represented a "majority of the employees in each new store as it opens." By letter dated April 2, 1993, the Union agreed with the Employer that before recognition was extended to the Union for "any new stores opening up under the jurisdiction of our agreement which expires on April 22, 1995, the Union must demonstrate a majority support by sending the [Employer] membership cards representing a majority of those employees in the store."

Thereafter, on June 29, 1994, the Union sent the Employer a letter asserting it represented a majority of the employees at the Employer's new store in Logan, West Virginia with dues check-off authorization cards attached demonstrating the Union's majority support at that store. In addition, the Union, in its letter, asserted that it had additional evidence demonstrating its majority support. The Union asked the Employer to begin dues deductions for the applicable employees at that location and requested confirmation that the Logan, West Virginia store employees would be covered under the existing collective-bargaining agreement. On July 7, 1994, the Employer sent a letter confirming that the Union had demonstrated majority support of the employees at the Logan, West Virginia store, and that the employees at that location would be covered under the existing collective-bargaining agreement.

When the Employer opened a new store in Sophia, West Virginia, the Union, by letter dated November 8, 1994, notified the Employer that it represented a majority of the employees at the Sophia store and attached employees' dues check-off authorization cards as evidence of the Union's majority support. The Union requested that the Employer start dues deductions for those employees, and confirm that the employees at the Sophia store were covered under the existing collective-bargaining agreement. Thereafter, by letter dated November 21, 1994, the Employer confirmed receipt of the "cards," agreed to begin deducting dues for the employees who signed the "cards," and confirmed that the employees at that location would be covered by the existing collective-bargaining agreement.

Similarly, when the Employer opened a new store in Princeton, West Virginia, the Union, by letter dated April 6, 1998, notified the Employer that it represented a majority of the employees working at the Employer's Princeton store and attached check-off authorization cards signed by employees to demonstrate its majority support. The Union requested that the Employer begin deducting dues for these employees, and confirm that the employees working at the Princeton store were covered under the existing collective-bargaining agreement. Following receipt of this letter, the Employer agreed to recognize the Union as the representative for the employees at the Princeton store, and agreed that employees at that location were covered under the extant collective-bargaining agreement.

It appears from the record that the last instance where the Employer voluntarily recognized the Union as the bargaining representative at one of its stores was when the Employer opened a new store in St. Albans, West Virginia. Thus, on July 14, 1998, the Union sent the Employer a letter asserting that it represented a majority of the employees at the St. Albans store and enclosed copies of dues check-off authorization cards as evidence of its majority support. The Union requested that the Employer begin deducting dues for the applicable employees and confirm that the St. Albans employees were covered under the existing collective-bargaining agreement. By letter dated July 17, 1998, the Employer verified that it would begin deducting dues for the employees who signed dues check-off authorization cards, and that the employees who worked at the St. Albans store would be covered by the existing collective-bargaining agreement.

The Recognition Clause

The record reflects that pursuant to the various agreements between the Employer and the Union, the Employer always agreed in the Recognition Clause, Article I, to recognize the Union "as the sole bargaining agent for all employees, regular and part-time, in those stores formerly owned by Cohen Drug Company and operated by the Cohen Division of [the Employer] in the counties of West Virginia wherein the above-mentioned stores have been located." In the collective-bargaining agreement effective from April 26, 1998 through April 28, 2001, the parties retained the same recognition clause, but added the language, "including 9-RC-14493, 9-RC-16150, 9-RC-16099 and 9-RC-16075." In the collective-bargaining agreement effective

from April 29, 2001 through April 30, 2004, the parties added a schedule D to the contract, which listed all stores included under the agreement by city and store number. The language in the recognition clause in the 2001 agreement stated that "The Company agrees to recognize the Union as the sole bargaining agent for all employees, regular and part-time, in those stores listed on attachment D, and those Rite Aid stores wherein the union establishes a majority in the following counties in the State of West Virginia: Boone, Cabell, Fayette, Greenbrier, Jackson, Kanawha, Logan, Mason, Mercer, Mingo, Nicholas, Putnam, Raleigh and Roane; and the following county in the State of Ohio: Gallia."

During negotiations for the current 2004 - 2007 collective-bargaining agreement, the Employer sought, unsuccessfully, to delete from the recognition clause the language about the Union establishing majority at newly-opened Rite Aid stores. The Employer's first proposal concerning the recognition clause was to "revise update list to represented stores; delete after acquired stores' clause; expand excluded positions to include floral manager position." (sic) The Union responded to the Employer's initial proposal, as it pertained to recognition by stating that it had no interest in the proposal, but agreed to make the floral manager position a management position contingent upon the Employer's withdrawal of part one of its proposal or the part relating to the deletion of the after acquired stores clause and the Employer's agreement to withdraw two other unrelated items. It appears that after further discussion by the parties, the Union rejected the Employer's proposal to delete the language relating to recognition.

Although it concedes that the majority language was not deleted from the recognition clause, the Employer maintains that the parties reached an understanding that the Union would establish majority support through a Board-conducted election. However, the Union's chief negotiator testified that he informed the Employer's representatives during negotiations that it would be ridiculous for the Union to agree to language in the contract that "gave the Union the right to have an NLRB election;" that it had this right in any event; and therefore, it would serve no purpose to have that language in the contract.

The Employer and the Union ultimately agreed to a new collective-bargaining agreement effective from May 1, 2004 to April 27, 2007. The agreement is currently being applied to approximately 50 stores in West Virginia. Article I of the agreement contains the following recognition clause:

The Employer agrees to recognize the Union as the sole bargaining agent for all associates, regular and part-time, in those stores listed on Attached Schedule D, and those Rite Aid stores wherein the union establishes a majority in the following counties in the State of West Virginia: Boone, Cabell, Fayette, Greenbrier, Jackson, Kanawha, Logan, Mason, Mercer, Mingo, Nicholas, Putnam, Raleigh and Roane; and the following county in the State of Ohio: Gallia.

> The following classifications expressly excluded from the unit are: Store Managers, Assistant Store Manager, Prescription Department Managers, Floral Managers Pharmacists, "On-Call" Associates, Intern and Extern Pharmacists, Management Trainees, Associates working less than fifteen (15) hours per week, and Guards and Supervisors as defined in the National Labor Relations Act.

The agreement does not contain any provision for a Board-conducted election.

Voluntary Recognition Under the Current Agreement

It appears from the record that in April or May 2005, the Union informed the Employer that it was in possession of cards from a majority of the employees at two newly-opened stores. However, the Employer refused to recognize the Union as the bargaining representative at those locations. In response, by letter dated June 14, 2005, the Union explained to the Employer the history of the card check procedure and how the Union has, in the past, demonstrated its majority status at each new store the Employer acquired in the counties covered by the existing collective-bargaining agreement. Following receipt of this letter, the Employer contacted the Union and advised the Union that it was not going to agree to the card check procedure described in its letter.

On February 7, 2006, the Union sent a letter to the Employer requesting recognition at the two additional stores acquired by the Employer. (It appears that these are the same two stores described above.) The Employer responded that it would not recognize the Union as their exclusive collective-bargaining representative. In response to the Employer's refusal to include the two additional stores under the existing agreement, the Union filed a grievance asserting that the Employer was in violation of the card check procedure as outlined in the extant agreement. The record reflects that the Union is presently seeking to arbitrate this grievance. As previously noted, the Employer seeks an election in a unit comprising of the employees at its Hurricane store.

## II. THE PARTIES' POSITIONS

The Employer's Position

The Employer makes three arguments in support of its position. Initially, it contends that it did not clearly and unmistakably waive its right to a Board conducted secret ballot election. Secondly, the Employer asserts that public policy prohibits an agreement made between an employer and a union to waive employees' rights to vote in a Board election. Finally, the Employer maintains that the Union failed to demonstrate majority support at the Hurricane store where it seeks recognition thereby arguably precluding reliance on the waiver.

The Employer contends that the after acquired stores clause contained in the recognition clause in the extant collective-bargaining agreement is ambiguous because it does not contain specific language requiring a card check procedure to establish the Union's majority status among employees. The Employer also maintains that the parties negotiated the current collective-bargaining agreement with the understanding that majority status at newly-opened stores would to be determined by a Board-conducted election. In support of its position, the Employer relies on bargaining notes taken by its representatives that purportedly reflect the parties agreement that majority status would be determined through an NLRB election process. The Employer argues that during negotiations for the new contract, the Union representative never used the words "card check" to describe the procedure it wanted to use to establish majority status.

The Employer next contends that there is a public policy against contractual waivers to Board-conducted elections. In this regard, Employer relies on the Board's recent decision in *Shaw's Supermarkets*, 343 NLRB 150 (2004). The Employer argues that the Board's decision in *Shaw's* reflects the Board's substantial policy concerns over whether an employer and a union can agree to waive employees' rights to vote in a Board election.

Finally, the Employer contends that it is entitled to an election because the Union has failed to establish that it represents a majority of employees at the two new stores. This argument seems to be premised on the contractual language that the Union must establish it represents a majority before a waiver can be found.

The Union's Contention

The Union contends that the parties never agreed during negotiations to change the card check procedure for establishing majority status at newly added stores or to add language to the recognition that would require the parties to use the Board election procedure to establish majority status. Moreover, the Union argues that it has the right under the law to petition the Board for an election, and that it would, therefore, be unnecessary to insert that language into the contract. Finally, the Union maintains that the Employer has waived its right for a Board election to determine majority status for those employees in stores acquired by the Employer by the clear language of the current and several preceding collective-bargaining agreements.

## III. THE LAW AND ITS APPLICATION

The Courts and Board have long recognized that the right of an employer to insist upon a Board-directed election to determine a union's majority status is not absolute. *United Mine Workers of America v. Arkansas Oak Flooring Co*., 351 U.S. 62, 72 fn. 8 (1956); *United Butchers Abattoir*, 123 NLRB 946, 957 (1959); *Snow & Sons*, 134 NLRB 709 (1961). Moreover, it is well established that when an employer agrees to recognize a union on proof of its majority status through a card check, an employer is bound by the card check results and, if a union establishes

majority status, an employer violates the Act if it thereafter refuses to recognize the union or withdraws recognition. *Green Briar Nursing Home*, 201 NLRB 503 (1973); see also *Research Management Corp*., 302 NLRB 627, 643 (1991).

However, an employer's right to a Board election under Section 9(c)(1)(B) can be rebutted only by clear and unmistakable evidence. *A-1 Fire Protection, Inc.*, 250 NLRB 217, 219 (1980). In this regard, the Board has found that an employer waives its right to a Board election by agreeing to an additional stores clause providing for voluntary recognition so long as majority support is demonstrated in some reasonable form. *Houston Division of the Kroger Co., and Retail Clerks International Amalgamated Meat Cutters & Butcher Workmen of North America, District Local 408, AFL-CIO (1974), revd. and remanded sub nom. Retail Clerks, Local 455 v. NLRB,* 510 F. 2d 802 (D.C. Cir. 1975), *on remand*, 219 NLRB 388 (1975).

If a valid contractual waiver exists in the subject case, there is no basis, under existing Board law, to process the current petition and it must be dismissed. *Central Parking System*, 335 NLRB 390 (2001) (RM petition filed in response to a union's invocation of an after-acquired clause does not raise a question concerning representation that entitles an employer to demand an election under Section 9(c)(1)(B). Finally, under current Board law, an issue of contract interpretation arising from the assertion of an after-acquired clause is a matter that is properly resolvable through the grievance-arbitration procedure. *Central Parking*, supra, at 391 fn. 3. Thus, in the context of an after-acquired clause, where both the unit is set forth and the contract is deemed to apply to the newly included employees, an arbitrator is appropriately able to determine if an employer has breached its agreement by refusing to apply the clauses in question, including the issue of the validity of the cards.

Based upon the entire record in this case and under existing Board precedent, I find the Employer's arguments unpersuasive and I will dismiss the petition. Contrary to the Employer's position, I conclude the language in Article 1, Section 1.1 of the current collective-bargaining agreement is unambiguous. The language plainly states the Employer "agrees to recognize(d) the Union as the sole bargaining agent for all associates, regular and part-time, in those stores listed on attached Schedule D, and those [Employer] stores <u>wherein the union establishes a majority</u> in the following counties . . . ." [emphasis supplied] This language was carried over by the parties from their 2001-2004 agreement, and as the record shows, the parties have agreed, and have used the card check process to establish majority status since April 1993. The Employer contends that during the most recent negotiations over this issue, it understood that a Board-conducted election would be utilized to establish majority status in newly added stores. Not only does the Union dispute the Employer's contention but the Employer's argument fails to address the fact that the agreement does not specifically state that majority status is to be determined through the Board's election procedure.

Here, the prior history of collective bargaining between the Employer and the Union lends significant weight to the Union's position that a card check procedure was the agreed upon way to establish majority status in newly added stores. The Employer's argument, that it was not aware of the prior history with the Union that majority status had been established through a card check procedure must be rejected based on record evidence establishing a history of the Employer granting recognition to the Union based on the submission of dues check-off authorization cards. Indeed, the Employer has long recognized the practice of determining majority status at its unrepresented stores by a card-check procedure and there has been a clear and unequivocal agreement by the Employer to recognize the Union on proof of majority status where the Union's majority status has been demonstrated. The Board has consistently granted deference to such a practice to determine majority status by a union. *Terracon, Inc*., 339 NLRB No. 35 (2003) (slip op. at 3); *Nantucket Fish Co.*, 309 NLRB 794, 795 (1992).

Regarding the Employer's argument that the Board's rulings in *Shaw's Supermarket* signal a change in its position regarding waivers, I cannot overrule extant Board precedent based on what the Board may do in the future. I am bound by current Board precedent as set forth in *Kroger* and *Central Parking System.* The extant Board precedent finds the existence of a waiver in situations similar to the one here and mandates the dismissal of the petition.

I also reject the Employer's argument that the Union has failed to establish it represents a majority of the employees in the stores in question. As previously noted, the issue concerning the Union's majority status, as well as the existence of an "after acquired" store clause under the extant agreement, is a matter that is properly resolvable through the grievance arbitration procedure which the Union has initiated. See, *Central Parking Systems* at 391, fn. 5.

Because I have determined that no question concerning representation exists based on the Employer's agreement to recognize the Union in newly opened stores within the jurisdiction of the Union where the Union demonstrates majority status, I will dismiss the petition.

## IV. CONCLUSIONS AND FINDINGS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. No question concerning representation among the employees covered by the petition exists for the above reasons.

## V. ORDER

**IT IS HEREBY ORDERED** that the petition in this matter be, and hereby is, dismissed.

## VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 – 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by 5 p.m., EDST on **June 20, 2006**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 6th day of June 2006.

/s/ Gary W. Muffley, Regional Director

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**Classification Index**

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347-2001 347-2067

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[1] / The name of the Union appears as amended at the hearing.

[2] / At the hearing, the parties agreed that if an election were directed, then the employees would be allowed to vote

on whether they desired to be represented by the Union in the existing multi-location unit.

[3]

/ At the hearing, the Employer made a motion to transfer the matter directly to the Board. The Employer's motion is hereby denied. If any party disagrees with my findings, it may file a request for review with the Board.